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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 344

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

versus

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE AND W. B. DOUGLAS, ETC., ET. AL.,

Appellees.

No. 345

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE AND W. B. DOUGLAS, ETC., ET. AL.,

Cross-Appellants,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY,

Cross-Appellees.

RESPONSE OF ATLANTIC COAST LINE RAILROAD COMPANY TO THE PETITION OF THE APPELLEES AND CROSS-APPELLANTS FOR REHEARING.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes Atlantic Coast Line Railroad Company, appellant and cross-appellee in the above stated causes, and

makes response to the petition for rehearing of the State of Florida and E. S. Matthews, W. B. Douglass and J. C. Carter, as and constituting the Florida Railroad Commission, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, and Wilson Lumber Company of Florida, appellees and cross-appellants, and for response thereto says:

The movants in the introductory statement to their motion undertake to state "the matters upon which the majority and minority opinions coincide". The first of these statements is that the majority and minority coincide in the conclusion "that the Cummer scale during the restitution period was the lawful State rate, having the force and effect of a State statute".

We take issue with that concept of the case. The opinion of the Court holds that:

> "In the interval between February 8, 1929, the effective date of the new schedule, and March 7, 1931, the Railroad Company had made collections in accordance with the order of the Commission *discarding the Cummer scale. Indeed, the Florida Commission, bowing to the authority of the Interstate Commerce Commission, had made an order in January,* 1929, *amended in April of that year, whereby the Cummer scale was declared to be suspended so long as the decree of the District Court remained in effect and unreversed.*" (Italics added.)

The opinion of the Court then recites:

> "After the mandate of reversal the Interstate Commerce Commission listened to new evidence, made a new set of findings, and prescribed the same rate that it put into effect before (186 I. C. C. 157; 190 I. C. C. 588). The basis of the decision was the unjust discrimination suffered by interstate commerce through losses of revenue resulting from the local rates."

The Court then refers to the litigation which proceeded over that finding. The finding was made July 5, 1932, but did not become effective until February 25, 1933, because of that litigation. The bills assailing that report and order of the Commission were dismissed, the Court saying: "Both the findings are now held to be sufficient". The Court then the findings are now held to be sufficient". The court then refers to the fact "that other proceedings had been taken in the District Court with a view to giving effect more completely to the mandate of reversal and that the shippers have sought a decree for restitution to the extent of the difference between the rates that have been paid from February 8, 1929, to March 7, 1931, and the lower rates that would have been paid if they had been adhering to the Cummer scale".

This matter was referred to a Master, who in November, 1933, recommended a decree of restitution for part, but only part, of the overcharges claimed. "He found that the Cummer scale was unjust and non-compensatory, and if enforced against the will of the carrier would result in confiscation; he found that for the years in controversy a substituted rate should be established, and established at such a figure as would void unjust discrimination against interstate commerce; he found that this end could be attained by the adoption of a schedule higher than the Cummer scale but lower than the one promulgated by the Commission as operative thereafter". The court also found that "an order declaring discrimination to be excessive and unjust was made by the Commission before the carrier had attempted to collect the higher charges". That decision was reversed by this Court in *Florida* v. *United States*, 282 U. S. 194. The order of the Interstate Commerce Commission was held void, but void, as the opinion of this Court holds, "solely upon the ground that the facts supporting the con-

struction were not embodied in the finding". The Court's opinion treats that order as voidable rather than void, but holds that the carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of the court.

Again the Court discusses the recent case of *Reinschmidt v. Louisville & Nashville Railroad Company* from the Supreme Court of Florida, 160 So. 69, and the claim that under the rule there established "the carrier must resort in the first place to an administrative remedy before the Railroad Commission of the State and look to the courts afterwards." The Court said:

> "If all this be accepted, the conclusion does not follow that the confiscatory character of a schedule is not to be considered in determining the equity of the carrier's possession when higher rates have been collected under color of legal right and consignees or shippers are trying to regain what they have paid."

In these circumstances it is difficult to understand the basis upon which it is thought that the majority opinion of the Court holds "that the Cummer scale during the restitution period was a lawful State rate, having the force and effect of a State statute." That which is confiscatory and void because it is confiscatory and, therefore, in violation of the constitutional provisions cannot be lawful. That which is unjustly discriminatory against interstate commerce, as has been consistently found in this case, cannot be considered lawful, it is by the terms of the statute denounced as unlawful.

The first report of the Commission (146 I. C. C. 717; R. 16, Vol. I, first record; that is record in case reported 282 U. S. 194), which found that the rates under the Cummer scale were less than reasonably compensatory and that the application of the Cummer scale would result in

undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce, has been reaffirmed in the second report of the Commission dated July 5, 1932 (186 I. C. C. 157, at 165; bound volume of exhibits, page 179), and likewise in the third report dated January 9, 1933 (190 I. C. C. 588 at 600; bound volume of exhibits, page 170).

This part of the motion of the movants continues with the statement that both the majority and minority of the Court had agreed "that the void order of the Commission ought to have been set aside by the District Court in the first instance." That statement is scarcely correct. The majority holds that the order was not void, but voidable. Nor do we think it correct to say that the majority and minority of the Court agreed "that the power conferred by Congress on the Interstate Commerce Commission to fix intrastate rates is limited to prospective action only; that power had not been granted to the Commission to give reparation for the past; that what was done in this case must be considered in the light of that established rule." The objection to the statement is that it overlooks the finding of the majority in its opinion as follows:

> "The Commission was without power to give reparation for the injustice of the past, but it was not without power to inquire whether injustice had been done and to make report accordingly. Indeed, without such an inquiry and appropriate evidence and findings its order could not stand, though directed to the years to come."

When the Interstate Commerce Commission is moved to set aside an established State rate its first inquiry is to find whether the established rate is or is not reasonable,

or whether it is unjustly confiscatory. That requires an examination into the past. If it determines that the rate is and has been reasonable, its jurisdiction does not exist. See *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88 at 92. That requires the backward view and, of course, in the making of rates one must also take the forward view. See *Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287 at 311, and authorities cited. The Commission took the backward view of this rate, as it had to, and found that the Cummer Scale had been working an injustice and that it had been confiscatory and unjustly discriminatory against interstate commerce. Why should not its finding in the backward view, which is essential to jurisdiction, be as powerfully protected as its findings as to the future aspects? Neither of the four statements in this segment of movants' brief appears to us to be wholly correct either in fact or in law; and they certainly offer no reason whatever why the majority opinion in this case should be altered in the slightest degree in their favor. The major premise of the movants' arguments lie within the statements which we have been discussing. Neither of them is valid; taken all together they are not valid. A fallacious major premise is bound to bring a fallacious conclusion.

Movants then make on page 2 of their motion statements of "*the assumptions upon which the majority opinion turned*" and then state:

> "The minority held that the Cummer scale being the only lawful rate under Florida law, the claimants were entitled, as a matter of right, to restitution measured by the Cummer scale, that measure being conclusive upon the parties and the Court under the Federal Constitution and Federal and State law. The majority held, however, that the right of the claimants to resti-

> tution measured by the Cummer scale was *prima facie* only and might be defeated by equitable defenses asserted by the Railroad Company."

The statement as to the position of the minority may be correct. The statement as to the position of the majority is not correct. It does not take into consideration the historical facts of the litigation nor the constitutional questions considered. We will discuss the statement as to the majority first.

Reinschmidt v. *Louisville & Nashville R. R. Co.*

The case of *Pensacola and Atlantic R. R. Co.* v. *State of Florida*, 25 Fla. 310, was decided on May 1, 1889. The case of *Reinschmidt* v. *Louisville & Nashville R. R. Co.*, 160 So. 69, was decided by the Supreme Court of Florida on January 23, 1935. More than 45 years elapsed between those two events. During all of that time the principle announced in the *Pensacola* case had been law. The matter involved in the *Reinschmidt* case is whether certain pieces of wood were to be classed as fuel wood or as stave bolts or headings. It is not a question of reasonableness of rates at all. It did not involve a rate which had been many times held confiscatory. The *Reinschmidt* case was first before the court on October 7, 1933 (150 So. 266), where the issues were stated to be, first, what was the applicable rate, if any, prescribed by the Railroad Commission for stave bolts and headings; second, whether or not the shipper had paid such applicable rate, or had only paid such amount on it as to leave an undercharge due to the railroads; the court saying:

> "These questions are mixed questions of law and fact to be decided upon a consideration of the particular tariffs claimed to be applicable, after they are adduced in evidence and are before the court together with facts and circumstances in evidence to show the nature and character of the material shipped."

When the opinion was filed on January 23, 1935, it appeared that nothing was involved except the "nature and character of a particular shipment", the court holding that after the nature and character of a shipment has been established or admitted "the Railroad Commission's tariff is, as a matter of law, the only applicable and controlling tariff, and the court is without right to enter upon any inquiry whether or not the prescribed Railroad Commission rate is just or reasonable or is otherwise proper as a proposition of administrative scientific rate-making". When it was established that the rate and that the commodity fell into one class or another class, there was no dispute as to what rate should govern. There was a dispute as to whether the commodity was in one or the other of the two classes mentioned. There was no attack on that rate because it was unreasonable or confiscatory and therefore unconstitutional. In the present case the question is, Was the rate void because out of the power of the Florida Commission, and was it unconstitutional because confiscatory? In the case at bar the litigation had been proceeding before the United States District Court for the Northern District of Georgia for about six years. The District Court had rendered one judgment on the subject and that judgment had been appealed to this Court and had been reversed (282 U. S. 194). A second case had been brought in the District Court and the rates fixed by the Interstate Commerce Commission had been sustained (292 U. S. 1). The suit on restitutions had been proceeding since the 7th day of March, 1931. The District Court of the United States had referred this case to a Master who had taken a great deal of evidence; his opinion had been filed. That opinion was sent back for a second report; that report had been contested for a long time and had been made and the rates had been found to be unjust, unreasonable and confiscatory. Decree was then rendered upon the same. The case had been ap-

pealed to this Court. *The Railroad Commissioners of Florida were parties to all of that litigation and offered evidence undertaking to prove that the rates fixed by them were just and reasonable.* In the argument in this Court it was admitted that the right to investigate the reasonableness of those rates was in the courts. This decision in the *Reinschmidt* case did not come down until after this case had been ordered reargued in this Court. This Court has held that

> "A decision of the highest court of a State construing a State statute, rendered more than a year after a judgment of a Federal District Court, cannot be given a retroactive effect in respect to the latter so as to make that erroneous which was not so when the judgment of that court was given."

See *Concordia Insurance Co.* v. *School District*, 282 U. S. 545, 553, citing several cases.

It has also been held in *Fidelity & Columbia Trust Co.* v. *Lucas*, 52 F. (2d) 298, 301, that

> "It is well settled that a decision of a State court, establishing a local rule of property or construing a State statute or contract made after the rights of a litigant in a Federal suit had accrued, and in a case in which he was not a party, is not binding upon the Federal court; citing *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349."

The power of the Commission as construed in the *Reinschmidt* case is derived from Section 6703, paragraph 13, of the Compiled General Laws of Florida, 1927. Said section is as follows:

> "To prescribe all rules and regulations appropriate for the execution of any of the powers conferred upon them by law either in express terms or by implication. All rules and regulations made and prescribed by the

commissioners shall be made *prima facie* evidence in the manner that the schedules are made *prima facie* evidence. Every rule, regulation, schedule or order heretofore or hereafter made by the commissioners shall be deemed and held to be within their jurisdiction and their powers, and to be reasonable and just and such as ought to have been made in the premises and to have been properly made and arrived at in due form of procedure and such as can and ought to be executed, *unless the contrary plainly appears on the face thereof or be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears.* All presumptions shall be in favor of every action of the commissioners and all doubts as to their jurisdiction and powers shall be resolved in their favor, it being intended that the laws relative to the railroad commissioners shall be deemed remedial laws to be construed liberally to further the legislative intent to regulate and control public carriers in the public interest. If in any proceeding to enforce any rule, regulation, schedule or order any part thereof shall be found invalid, the court shall proceed to enforce such portion thereof as may be valid if the same can be done." (Italics added.)

The attack made in the District Court on the Florida rate (the Cummer scale) is not only that it is unjust and unreasonable and contrary to the powers of the Florida Commission, but that it is also void because it violates the due process clause of the 14th Amendment to the Constitution of the United States.

The provisions of Section 6703 of the Compiled General Laws of Florida above quoted clearly contemplate that there may be and should be a trial in which parties at interest were entitled to make it appear "by clear and satisfactory evidence" that the rate was not reasonable and just, that it was not such as ought to have been made in the premises, that it was not properly made or arrived at in

due form of procedure, and that it was not such a rate as can and ought to be executed. The *Reinschmidt* case is not authority for rules to the contrary.

The State of Florida has no right to enforce confiscatory rates upon a carrier for a single day. If the rates under the Cummer scale were confiscatory, as has been abundantly established in this case, why should it be necessary to go to an administrative body to have that determined? That administrative body has no right to make its rates retroactive. If they should make rates and those rates should become the subject of litigation and the judicial authority should hold that the rates were confiscatory and void and should direct that the rates should be changed even *nunc pro tunc*, "the plaintiffs would have no adequate remedy for what they may have lost before the court shall have acted".

See *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, 293, citing *Springfield Gas & Electric Co.* v. *Barker*, 231 Fed. 331, 335.

> "Rules of comity or convenience must give way to constitutional rights."
>
> *Oklahoma Gas Co.* case, *supra*.

The carriers cannot be required by Florida statutes to resort to the Commission or to the State courts to preliminarily show confiscation. In such cases the carriers have the right to the independent judgment of the courts as to both the law and the facts.

See *State Commission* v. *Wichita Gas Co.*, 290 U. S. 561, citing

Ohio Valley Co. v. *Ben Avon Borough*, 253 U. S. 287, 289;

Bluefield Co. v. *Public Service Comm.*, 262 U. S. 679, 689;

United Railways v. *West*, 280 U. S. 234, 251.

In *Pacific Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, 204, the Court held:

> "Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a Federal court of equity from suspending the daily confiscation if it finds a case to justify it." Citing, *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, 293.

These cases all hold that in such cases the *Prentis* case, in 211 U. S. 210, has no application.

We respectfully submit that the Florida decision in the *Reinschmidt* case is not sound and inapplicable if it is intended thereby to say that that decision means that one cannot set up the unconstitutionality of a rate prescribed by the Florida Railroad Commission unless and until it has exhausted its remedies before that Commission. Discrimination cannot be avoided by confiscation.

In the case at bar this litigation had been proceeding for years with the Railroad Commissioners parties to the case and they were constantly asserting that the Cummer scale of rates were just, reasonable and non-confiscatory. The thought of our opponents is that this carrier can be forced to await the outcome of a controversy before those same parties litigant transformed into a tribunal. That reasoning would reduce the Constitution to a mockery. Certainly the law justifies the statement of the majority opinion where, after discussing the claims made for the *Reinschmidt* case, the opinion states:

> "If all this be accepted, the conclusion does not follow that the confiscatory character of a schedule is not to be considered in determining the equity of the carrier's position when higher rates have been collected under color of legal right and consignees and shippers are trying to regain what they have paid."

Especially is this true when the Florida Commission, a party to bringing about this result, would be the authority to whom the carrier must appeal while the confiscation continues.

The *Reinschmidt* case did not arise out of a determination by Federal authority that the State rate involved was less than compensatory and that it was discriminatory and should be set aside. If the *Reinschmidt* case is authority for anything, it is not authority for the position which is asserted for it here that Federal authority had no right to displace State rates; nor is it authority for the proposition that the State rule is to govern where Federal power is incompletely exercised in intermediate cause, but is completely exercised in the final process; nor is it authority for the proposition that Federal authority must await the action of State authority in determining the effect of the exercise of Federal power.

Florida v. *U. S.*, 282 U. S. 194, 210.

The exercise of Federal authority over the Cummer scale of rates had long proceeded with the participation of the Florida Commission. That element was not in the *Reinschmidt* case, which was wholly between private parties.

We respectfully submit that the movants' statements of "the assumptions upon which the majority opinion turned" are wholly incorrect and furnish not the slightest reason for any change except in the minority.

Discussion of First Point Offered by Movants.

(See Page 3 of Their Motion.)

This point is stated as follows:

> "The opinion of the court assumes throughout that the claims of Florida and of the claimants are founded upon a procedural slip and in imperfection of form in

> the order of the Interstate Commerce Commission which was stricken down by this court upon the former appeal, whereas in fact that order was void not only for lack of basic and essential findings, but because there was a total lack of revenue evidence before the Commission to support such finding."

The first order of the Interstate Commerce Commission (146 I. C. C. 717) was set aside because of the lack of basic and essential findings. The evidence to support these findings, if it were present in the record, was not examined or looked into by the court.

In *Florida* v. *United States*, 292 U. S. 3, at 9, the Court said:

> "On the new hearing the Commission made comprehensive findings to supply what had thus been found to be lacking";

reaffirming the defect found in the first order of the Commission expressed in *Florida* v. *United States*, 282 U. S. 194, at 215.

> "In the absence of such findings we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence, not to make findings for the Commission, but to ascertain whether its findings are properly supported."

Under paragraph (a) of this general subject, in the caption on page 5 of their motion, the movants assert that "there was no evidence before the Interstate Commerce Commission when the void order was made to support the basic and essential findings". We respectfully submit this is error.

The Court declared that its action was based upon the lack of the basic and essential findings required to support the Commission's order, adding:

> "In the absence of such findings we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit."
> *Florida* v. *United States*, 282 U. S. 194, 215.

That is the interpretation by the Court of its acts.

A Synopsis of the Analysis of the Evidence in the First Case.

A synopsis of the analysis of the evidence in the first case is as follows:

(1) History of Cummer scale of rates.

(2) Relationship between the rates under the Cummer scale and the Florida-Georgia interstate scale on August 2, 1928, and the latter scale as fixed in this proceeding shows that the Cummer scale rate is less than half of the rates under either of the other scales.

(3) Relationship of the Cummer rates to intrastate rates on the same commodities in Georgia, shows that the Cummer scale of rates is not more than one-half of the rates prescribed by the Georgia Commission for the same commodities intrastate in Georgia.

It was this condition, called by the Georgia Commission "intolerable", which brought on the proceeding before the Interstate Commission.

(4) Florida Commission condemned the Cummer scale of rates.

The Florida Commission condemned the Cummer scale, when it was offered, as being too low and

as being discriminatory, and as being prejudicial to commerce in all classes of freight.

(5) Comparison of the Cummer scale of rates between points in Florida with rates on same commodities between points in Florida and points in Georgia shows that the Cummer scale of rates is much less than one-half, often about one-third of the interstate rate from Florida to Georgia; and that a car of lumber manufactured in Valdosta or Thomasville, Ga., would be at a disadvantage of $69.00 as compared with a car manufactured in Florida and moving a like distance from forest to mill.

(6) Comparison of Cummer scale with the intrastate scales in North Carolina, South Carolina, Georgia, and Alabama, and with interstate rates, shows that the Cummer scale is less than one-half of the average of the rates under those scales.

(7) Comparison of Cummer scale of rates with the rates on the same kind of logs moving intrastate over Florida railroads other than Atlantic Coast Line, shows that the Seaboard Air Line's rates are about twice as high. This latter road operates about 1850 miles in Florida, while the Atlantic Coast Line operates about 2200 miles.

The Cummer scale "is the lowest scale to be found." (Abrams.) (Price.)

(8) Like comparison with the corresponding rates on the Georgia Southern & Florida Railway shows approximately even greater disparity than that shown by comparing the Seaboard's rates.

Various kinds of comparisons are made by the witness Potter, of the Georgia Southern & Florida, state and interstate—showing the Cummer scale to be only one-third to one-half of other rates.

(9) The Central of Georgia Railway intervened and gave testimony to the "far-reaching effect if the Florida rates are extended into Georgia".

(10) Comparison of the rates on logs under the Cummer scale with the rates on other commodities having like kind of transportation characteristics shows that the Cummer scale is only about 40 per cent. of the rate on brick; and the yield on the carriage of logs is much less than on the carriage of the same amount of cotton seed, cotton seed hulls, clay, gravel, sand, stone, asphalt, shale, cord wood, cross ties, cement, etc.

(11) More detailed comparison of rates on logs with brick, sand, gravel and cement shows the continued and great discrimination in favor of the log movement; and also the great discrimination against commerce. For instance, the revenue on a car of logs weighing 55,000 pounds moving interstate 50 miles from Florida would be $27.50; and if the same car had moved intrastate in Florida, it would have been $11.55.

(11a) Comparison of percentage relationship which the Cummer scale rates on logs bear to lumber rates ordered by the I. C. C. in *Meridian* case, 60 I. C. C. 5.

(12) Extent of discrimination which will be worked by a continuance of the Cummer scale.

The amount of timber to be cut into logs and transported is measured by hundreds of millions of feet. It will require 59,529 car loads of logs to move the 250 million feet of cypress of the Wilson Cypress Company. To move the Cummer Cypress timber it would take 28,257 carloads. It will require 186,800 car loads of logs to remove more than one billion feet of logs of the Brooks Scanlon Corporation. The Putnam Company's holdings aggregate more than a billion feet.

(13) Undue discrimination which the Cummer scale works against the Georgia manufacturer of lumber in the markets of consumption.

If logs moved 150 miles intrastate in Florida and were manufactured into lumber and sold in a market of the Northeast, that is, from Washington, D. C., up to Portland, Maine, the Florida lumber would have an advantage of $61.50 a car as against lumber manufactured from the same logs moved the same distance to a Georgia manufacturing point. This is more than sufficient to give the Florida manufacturer monopoly of those markets.

(14) The territorial extent of investigation.

The Commission investigated the condition of timber and logs and mills at many points in Florida throughout the northern part of the State, the center of the State, and quite far in the south. If the points investigated by the Commission were used as a center and circles were drawn from them with a radius of 170 miles (the maximum distance of the Cummer scale) those circles would overlap many times.

(15) Cost Studies.

Evidence was offered by the Atlantic Coast Line Railroad to show that the cost of an average haul from Perry and Carbur to Eastport and Milldale, left only $1.34 after deducting the cost, not including taxes and equipment rentals. The Florida Commission offered evidence that showed this item to be $5.85 per car. Neither of these cost studies dealt with the individual car load shipments. Thus the Commission had before it evidence on the question of costs.

(16) There is timber in the northern part of Florida available for use in Georgia.

The evidence shows that there is substantial timber in the northern part of Florida available for use by manufacturers in Georgia. Little of this is in large tracts. It shows that there is a great deal of timber in north Florida which would be available for manufacture in Georgia, except for the fact that it is owned by mill owners operating in Florida. The evidence also shows that this difference in freight rate has a substantial effect upon the market for stumpage and that the rate thus affecting the market for stumpage affects interstate commerce from its origin and that this continues on until the manufactured product reaches the market.

(17) Rates in South Florida.

(18) Similarity of circumstances and conditions of transportation covered by comparisons of rates.

It is submitted that the hearings were full; investigations were State-wide; and the conclusion reached by the Commission as to undue preference to intrastate shippers and undue prejudice and discrimination against interstate shippers and interstate commerce was amply supported by evidence, and the evidence was entirely sufficient to have sustained the essential intermediate findings. There were two hearings—one at Valdosta, Georgia, beginning on October 20, 1926 (R. 399), and the other at Jacksonville, Florida, on January 18, 1927 (R. 531); twenty-six witnesses were examined and fifty-three exhibits were offered, and the case went through a long contest in the Commission and in the courts below.

The Accounting Evidence.

The accounting evidence was very full and it may be seen by the evidence of J. Lowell White (Old Record, p. 522)

and the evidence of the witness Pettijohn (Old Record, p. 629) and the various exhibits filed by both of those witnesses, including many accounts. The court thought that the conclusions drawn from those accounts embraced certain arbitrary conclusions. It did not find that the evidence was not at hand from which correct conclusions could have been drawn.

In paragraph (b) of the *First Point*, on page 7, movants state:

> "Revenue evidence was lacking in the original proceedings resulting in the void order, because the Atlantic Coast Line defended the Cummer scale as applied to intrastate commerce in Florida. Those proceedings were essentially proceedings involving persons and localities (at least as far as the Railroad Company was concerned) confined by the evidence to North Florida, and this court has so held."

The traffic manager of the Atlantic Coast Line Railroad Company referred to in this motion (O. R. 491) did not reach the conclusion which movants undertake to draw therefrom. On the other hand, he testified that there are no different conditions in Florida that would have justified the establishment of a lower rate under the same controlling conditions than would be applied in the State of Georgia.

The rates in Georgia, as the evidence shows, were very much higher than the Cummer scale of rates.

The essential reason why the Georgia Public Service Commission filed its petition was that it was making a general revision of rates and felt that the log rates should be increased, but met with opposition from the Florida shippers because of the discrimination worked by the Cummer scale of rates.

Second Point (page 9):

> "Due process of law forbids the use of the new evidence which was before the Commission in the reopened proceedings to supply the deficiency in the evidence on which the order of August 2, 1928, was based."

It is difficult to understand this point. The case had been tried, the court had stated that we could again appeal to the Commission in the same cause, the Railroad did appeal to the Commission to make the further findings contemplated. It did reopen the case and a good deal of evidence was taken. All of the persons who were in the original case were parties in the reopened case. As a matter of fact, the original case and the reopened original case were simply one case. The Report and Order in the re-opened case (186 I. C. C. 157, bound volume of Exhibits, p. 17) were offered and received in evidence in the present case.

It has been held many times that the court has the right to take judicial notice of prior proceedings in cognate cases. For instance, in *Dimmich* v. *Tompkins*, 194 U. S. 540, 548, the Court held:

> "The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceeding now before it."
>
> See also *Freshman* v. *Atkins*, 269 U. S. 124; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217.

In the *Bienville Water Co.* case the Court said:

> "The decree in the other suit was neither pleaded nor proved, and no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This doubtless is technically true, but we take judicial notice of our own

records, and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this."

See:

National Fire Ins. Co. v. *Thompson*, 281 U. S. 313-336;
De Bearn v. *Safe Deposit Co.*, 233 U. S. 32;
West Ohio Gas Co. v. *Public Utilities Comm.*, 79 Sup. Ct. Rep. 272-279.

Third Point (page 10):

This point is

"Even if by the doctrine of relation the findings and evidence supporting the valid order of July 5, 1932, could be related back to the void order of August 2, 1928, such evidence and findings would not support the void order of August 2, 1928."

The court has found that the order of August 2, 1928, was not made void but voidable, though it had to be obeyed by the carrier. The court has also found that in the reopened proceedings resulting in the order of the Commission reported in 186 I. C. C. 157, the Commission was under the necessity of making its findings of fact reach backwards and also to the future. The Commission reaffirmed the findings of fact in its first report, as we have pointed out, and did that again in the report in 190 I. C. C. 588. The report of the Commission in 182 I. C. C. has been sustained by the District Court and by this Court (292 U. S. 1).

In paragraph (b), page 11, movants allege that "conditions existing subsequent to the order of August 2, 1928, were, as a very consequence of that order, different from the conditions existing prior to that date".

The whole field of this subject matter was minutely combed in the evidence and the old record and in the evidence in the reopened case, and again in the evidence in the case involving restitutions—the present case. All of those records are before this Court and the Court has the right to take judicial cognizance of them; and all of that evidence showed that the discrimination against interstate commerce which existed in 1928 continued to exist through February 24, 1933, when the Commission's order of July 4, 1932, went into effect.

Fourth Point (page 13):

Movants make the following point:

> "The order of this court upon the former appeal denying the motion of the Railroad Company to stay the mandates and the effect and operation of the mandates is conclusive of the right to restitution."

This appears to need no reply.

Fifth Point (page 14):

> "The refusal to grant restitution gives an effect to the Interstate Commerce Act to restrict State sovereignty which was never intended by Congress."

That point carried to its logical conclusion would mean that when the movants asked for restitution the law afforded no right to resist it.

We have shown that the Cummer scale of rates was not the lawful State rates of Florida. We have shown that they were confiscatory under the due process clause of the 14th Amendment. They were also violative of the Commerce clause of the Constitution because of their unjust discrimination against interstate commerce. They were unjust and unreasonable.

Sixth Point (page 16):

Movants make the point that

> "Even assuming that restitution were a matter of grace instead of a matter of right, the conduct of the Railroad Company in the original proceedings before the Commission, and the record in this cause, furnished equitable as well as legal grounds requiring that restitution be awarded."

This argument is, that because the Railroad Company treated the Cummer scale as a voluntary rate and used it for a good many years it had no right to retire therefrom. It did retire from that rate before the beginning of the restitution period. It might as well be argued that because the Florida Commission at the time these rates were put in, opposed them because they were unjust and unreasonable and would work discrimination, that the Commission had no right to oppose the change. The times have severely changed; the World War has been fought; and the change in economic conditions has come. All of those things have been gone over in the greatest detail in the progress of the various phases of this case and they have been solved against the contentions of the movants. There is no merit in them.

Seventh Point (p. 16):

Movants make the point that:

> "The circumstances and conditions under which the logs of certain of the claimants moved warrant separate consideration of their claims if the principle announced in this Court's opinion are to stand."

It is difficult to see how one party, urging the application of the same confiscatory and unconstitutional measure of his recovery, should prevail merely because he shipped

more logs than the other parties. It is said that these large shipments in such quantities as to warrant movements in trainload lots on regular schedules give rise to an equity in favor of three shippers, namely, Brooks-Scanlon Corporation, Cummer Cypress Company and Wilson Cypress Company.

Lower charges for large shipments in trainload movements have been considered by all rate-making authorities as the very epitome of discrimination. The Florida Commission itself refused to approve the establishment of trainload rates at the time they were offered as voluntary rates on the part of the Atlantic Coast Line (R. 20, first record).

Equity is equality; the shippers are to be treated alike. The trainload shipments moved on the same rates as the carload shipments during the restitution period and restitution is claimed on the basis of the same carload scale—that is, the unlawful Cummer scale.

Eighth Point (p. 19):

Movants make the point that:

> "The court failed to recognize that both the master and the District Court had found that the schedule set up by the void order of the Interstate Commerce Commission was unreasonable."

The majority opinion, in the very language quoted from page 11 thereof, reverses this holding of the District Court. If the whole of this paragraph of the opinion is considered, it appears that the Court looked to the record, examined the evidence and was not satisfied that sufficient evidence had been presented to show that the scale of rates fixed by the Interstate Commerce Commission was unreasonable; that the Master's midway scale was reasonable, and this especially in the light of the evidence by the carrier show-

ing the confiscatory character of the Cummer scale. The majority opinion in this cause states:

> "We think the claim for restitution should have been rejected altogether. In thus holding we do not suggest that the determination of the Interstate Commerce Commission as to the rates to be operative thereafter had the force of *res judicata* in respect of past transactions (citing cases). None the less, as the court below conceded, it was entitled to great respect, representing, as it did, the opinion of a body of experts upon matters within the range of their special knowledge and experience. (Citing cases.) This court has already held that their findings had support in the evidence before them. *Florida* v. *United States*, 292 U. S. 1, 12."

The minority opinion of this Court in this case misses the point of primary essence of equity jurisdiction. Equity follows the law but relieves in situations wherein the law by reason of its universality is deficient. In every cause in equity the court working with its equitable remedies to greater or lesser extent "in effect denies legal rights." It might even be admitted for the purposes of this argument that the shippers, on the coming down of the mandates, had a *perfect legal right to restitution*. *B. & O. Rd. Co.* v. *United States*, 279 U. S. 78.

If no issue had been raised as to the constitutionality of the Cummer scale of rates there would have been recovery in full, but the unconstitutionality of those rates, the very essence of the shippers' proof of their claims, the measure of their recovery, was illegal.

Is it to be thought for an instant that a Federal court, exercising equitable jurisdiction, would deny a litigant the right to defend against the application of an unconstitutional rate used for the purpose of establishing its liability? Is the defendant required to file a plenary suit against the very same parties to set aside the unlawful rate? In the

case at bar the attack on the Cummer scale was not collateral. It was as direct as any defendant could attack. At the very first opportunity after the application of the rate became *involuntary* the carrier charged in a suit with the proper parties present (Florida Railroad Commissioners) the violation of its contitutional rights and sustained its charge. What more impressive equity could be shown?

The denial of the motions for restitution, after full hearing on their merits, is indisputably a final determination of this cause.

It is respectfully submitted that the Motion of the Appellees and Cross-Appellants for rehearing in this cause should be denied.

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